No. 25-1105

In the Supreme Court of the United States

FRANK THOMPSON,

Petitioner,

v.

CARL WILSON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, MAINE DEPARTMENT OF MARINE RESOURCES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE CATO INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The questions presented are:

1. Whether Maine's requirement that lobstermen place a GPS tracking device on their private fishing vessels and submit to 24/7 surveillance constitutes an unreasonable trespassory search in violation of the Fourth Amendment?

2. Whether courts must evaluate the reasonableness of a warrantless administrative search based on the Fourth Amendment's protections against government trespass, and not solely on a business owner's reasonable expectations of privacy?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. Cato's interest in this case arises from its mission to support the rights that the Constitution guarantees to all citizens.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington,

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

D.C., and all 50 state capitals, the interests of its members.

Amici have a particular interest in this case as it concerns the continuing vitality of the Fourth Amendment and meaningful restraints on the exercise of government power.

SUMMARY OF ARGUMENT

In March 2022, the Atlantic States Marine Fisheries Commission directed member states to require that all federally permitted lobstermen affix GPS tracking devices to their vessels. Pet. App. 5a–6a. Maine complied by promulgating a rule (the MDMR Rule) compelling Petitioner Frank Thompson, along with other Maine lobstermen—to attach a device to his boat that transmits his location to the government once every minute, every hour, every day—including when the vessel is docked and when Thompson is using it for personal purposes. *Id.* at 6a. The device has no off switch for the end of the workday. It does not pause when Thompson needs to shuttle a family member to the mainland. Pet. Br. 7. It runs continuously, generating a detailed, permanent record of Thompson's movements that the government may retain and mine indefinitely.

Thompson filed suit in federal court to challenge the MDMR rule as a violation of his Fourth Amendment right to be free from unreasonable searches and seizures. *Id.* at 8–9. On appeal, the First Circuit upheld the Rule as a permissible search based on its application of the administrative search exception outlined in *New York v. Burger*, 482 U.S. 691 (1987). This petition follows.

The First Circuit's analysis misses a threshold question. The Fourth Amendment prohibits unreasonable searches *and* unreasonable seizures. U.S. CONST. amend. IV. Each government action requires separate analysis. By compelling Thompson to permanently affix a government GPS device to his boat, Maine has meaningfully interfered with his possessory interest in his property. That is a seizure. *See Soldal v. Cook*

Cnty., 506 U.S. 56 (1992). The administrative search exception addresses searches. Its application in this case cannot authorize a seizure of Thompson's property.

Even under the administrative search exception, the First Circuit's decision cannot stand. A warrant exception cannot authorize a search that no warrant could. *Burger*'s three-prong test was designed to ensure that administrative searches stay cabined to the same limits a warrant requires, not authorize far broader searches. The First Circuit's analysis imposes no meaningful restraints on a search's necessity, method, or scope. It turns an exception into a windfall.

The First Circuit's error will not stay confined to Maine's lobstermen. The decision below creates a replicable framework under which any agency may impose continuous GPS tracking with no judicial oversight and no endpoint. This Court has already recognized that technology-enabled location tracking poses a serious threat to the Fourth Amendment. *See Carpenter v. United States*, 585 U.S. 296 (2018). That threat is amplified by the vast number of industries that have already been accorded "closely regulated" status. The First Circuit's decision would subject every one of those industries to mass surveillance. The Fourth Amendment's protections cannot weaken as regulation expands. This Court should grant the petition and reverse.

ARGUMENT

I. THE FIRST CIRCUIT DID NOT CONSIDER WHETHER THE MDMR RULE EFFECTS A SEIZURE.

The Fourth Amendment protects against "unreasonable searches *and seizures*." U.S. CONST. amend. IV (emphasis added). The constitutional text makes clear that the Framers were "not only concerned about 'the violation of privacy brought about by the general ransacking of homes and places of business,' but also 'the carrying away of everything upon which hands could be laid.'" Zachary R. Cormier, *Constitutional Dead Zones: Problematic Trends for Seizures of Cell Phones Connected to the Recording of Protests and Police Activity*, 103 DENV. L. REV. 97, 129 (2025) (citation omitted).

Since the latter half of the 20th century, the question of what constitutes a search has dominated Fourth Amendment jurisprudence. But decades of search-focused analysis have not erased the independent need to assess whether a government intrusion into private property amounts to an unreasonable seizure. *See generally Soldal*, 506 U.S. at 56. In its decision below, the First Circuit cabined its inquiry to whether the MDMR Rule constitutes a search. In doing so, it overlooked an equally fundamental question: whether Maine's rule compelling lobstermen to install and continuously power GPS devices aboard their vessels effects a seizure of their boats. The search and seizure inquiries are distinct, each with its own doctrinal framework and constitutional consequences. It is important that courts consider both when evaluating whether government action violates the Fourth Amendment.

Searches and seizures invade a person's property interests in different ways. *See Horton v. California*, 496 U.S. 128, 133 (1990). While a search may "compromise[] the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." *Id.* Thus, this Court has held that "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interest in that property," irrespective of whether that intrusion violates a person's reasonable expectation of privacy. *United States v. Jacobson*, 466 U.S. 109, 113 (1984); *Soldal*, 506 U.S. at 68. Accordingly, finding that a person lacks a reasonable expectation of privacy in an object does not resolve the separate question of whether the government's interference with that property amounts to a seizure. *Jacobson*, 466 U.S. at 118 (engaging in a separate seizure inquiry after determining no search occurred); *United States v. Place*, 462 U.S. 696, 707 (1983) (same).

But this Court's decision in *Soldal* makes this point explicit. In that case, a local police department helped facilitate the illegal removal of a mobile home from a mobile home park. 506 U.S. at 58. The Seventh Circuit held that this action did not amount to a seizure because there was no corresponding invasion of privacy. *Id.* at 60, 69. This Court rejected the idea that the Fourth Amendment fails to protect a person's possessory interests "where neither privacy nor liberty was at stake," *id.* at 62, and instead held that "seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place," *id.* at 68.

Had the First Circuit engaged in a separate seizure analysis, it is likely that it would have concluded that

the MDMR Rule meaningfully interfered with Thompson's possessory interest in his boat. This Court has acknowledged that even a minor permanent physical occupation of an individual's property can interfere with his possessory interest if it deprives him of the right to exclude. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)) (analyzing property in the context of the Takings Clause but noting that the right to exclude is universally held to be a fundamental element of property rights).

The MDMR Rule amounts to more than a minor intrusion. It requires Thompson to install and power a GPS device that monitors the boat's location 24/7 while also collecting audio information aboard the vessel. Pet. Br. 6. The GPS device must remain enabled at all times, without exception for time of day or location. *Id.* at 7. It doesn't matter if the vessel is docked or at sea, or whether Thompson is using the boat for personal reasons—the GPS tracker must remain present and active. *Id.* The MDMR Rule does not just interfere with Thompson's ability to possess and use his boat, it supplants his control of the vessel entirely by injecting the government's perpetual, warrantless presence. *See Silverman v. United States*, 365 U.S. 505, 511 (1961) (holding the secret installation of a listening device in a person's home violated the Fourth Amendment by "usurping part of the petitioners'" property).

The Fourth Amendment's protections against unreasonable searches and seizures are best understood not as alternative inquiries, but as independent constitutional guarantees each warranting its own careful analysis. By confining its review to whether the MDMR Rule constitutes a search, the First Circuit left

unanswered an equally important constitutional question: whether compelling Thompson to permanently install and continuously power a GPS device aboard his vessel amounts to an unreasonable seizure of his property. The government's acquisition of personal property as a platform for ongoing, warrantless surveillance is best understood as the kind of intrusion the Fourth Amendment was designed to address—and one that benefits from a complete constitutional analysis. This Court should grant the petition and remand this case to determine whether the government unreasonably seized Thompson's property.

II. A WARRANT EXCEPTION CANNOT AUTHORIZE SEARCHES THAT A WARRANT COULD NOT.

The administrative search exception may relax the need for judicial preauthorization, but it does not grant search authority beyond what a warrant would allow. *Burger*, 482 U.S. at 703. The three-prong *Burger* test was designed to ensure that warrantless searches in closely regulated industries are backed by the functional equivalent of a warrant. *Id.* at 702. Yet the First Circuit reads *Burger* to clear the way for searches that a warrant could never authorize. Pet. App. 29a–30a.

The warrant requirement was central to this Court's reasoning when it first defined the administrative search exception. *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 528 (1967); *See v. City of Seattle*, 387 U.S. 541, 543 (1967). Warrants exist to prevent the government from conducting searches broader than a neutral magistrate will allow. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978). Regulatory need does not eliminate the underlying concern, though it may change how it is addressed. *See*, 387 U.S. at 545; *Camara*, 387 U.S. at 533 ("We simply cannot say that the

protections provided by the warrant requirement are not needed in this context.").

This Court formalized this understanding in *Burger*, establishing a three-prong test meant to replicate—not override—the warrant system. *Burger*, 482 U.S. at 702. First, to ensure that the search serves a legitimate purpose rather than a pretextual one, "there must be 'substantial' government interest" in the regulatory scheme. *Id.*; *see also Camara*, 387 U.S. at 538–39 (comparing the government's interest to the probable cause requirement). Second, warrantless inspections must be "necessary," not merely convenient. *Burger*, 482 U.S. at 702. Finally, the regulatory scheme must also "provide a constitutionally adequate substitute for a warrant." *Id.* at 703. Thus, the scheme must set limits in "time, place, and scope." *Id.*

The three prongs ensure that searches under the exception are kept within the bounds of a warrant. They are interlocking requirements, and all three must be satisfied. A court that relies on the government's "substantial interest" to justify administrative searches of any method and duration has not satisfied *Burger*—it has used its most permissive prong to avoid its most demanding ones. *See City of Los Angeles v. Patel*, 576 U.S. 409, 426–28 (2015) (holding that the government's substantial interest cannot save a regulatory scheme that fails prongs two and three); *cf. United States v. Biswell*, 406 U.S. 311, 312 n.1, 315 (1972) (upholding a regulatory scheme because it was carefully limited in time, place, and scope); *Donovan v. Dewey*, 452 U.S. 594, 604 (1980) (same).

The First Circuit's treatment of both the second and third prongs reflects this error. According to the decision below, *Burger*'s second, "necessity" prong asks

only whether warrantless searches are necessary in general, not whether the particular method employed is necessary. Pet. App. 25a; *see Burger*, 482 U.S. at 702. In its view, the method of search "need only reasonably serve" the government's interest. Pet. App. 25a. But under this reading, an agency that decides some kind of warrantless inspections are necessary would ipso facto have free rein to deploy continuous video surveillance, indefinite GPS monitoring, or any other investigative technique. This conflicts with this Court's understanding of *Burger*. *Patel*, 576 U.S. at 427.

The First Circuit also warps *Burger*'s third, "constitutionally adequate substitute" prong. When the government seeks to install a GPS device via warrant, federal rules and Maine's own statutes cap its use at 45 and 60 days. *See* FED. R. CRIM. P. 41; ME. STAT. tit. 16, § 639(4) (2025). But no such restrictions apply to the GPS device attached to Thompson's vessel. *See* Pet. App. 151a–152a. A test designed to replicate the warrant system cannot authorize a search that system specifically forbids. Maine's administrative scheme overrides the "time, place, and scope" limits imposed in the warrant system and so cannot be a "constitutionally adequate substitute" for it. *Burger*, 482 U.S. at 703.

The Fourth Amendment requires more than just a sufficient regulatory interest: it prescribes careful limits on searches and seizures regardless of context. The First Circuit has used a warrant exception to authorize a search power that a warrant could not confer. This Court should reverse that error.

III. THE DECISION BELOW ENABLES MASS GOVERNMENT SURVEILLANCE.

No Fourth Amendment violation exists in isolation. *See* Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669, 670 (1988). The First Circuit has handed agencies a replicable framework for continuous surveillance with no time, place, or scope constraints. It has sanctioned further expansion of the "too permeating police surveillance" that this Court has cautioned against. *Carpenter*, 585 U.S. at 305.[2]

GPS tracking is categorically different from the spot inspections for which the administrative search exception was developed. GPS surveillance is cumulative and unrelenting. *Compare Burger*, 482 U.S. at 693 (periodic inspections of junkyards) *with United States v. Jones*, 565 U.S. 400, 412 (2012) (long-term GPS monitoring of a vehicle). Location-monitoring technology has made it possible for the government to track a person's movements "for years and years." *Carpenter*, 585 U.S. at 313. The data collected by these devices reveal more than merely the location of bodies at discrete points in time: they open "an intimate window into a person's life" by generating a "precise, comprehensive record" of movements revealing far more than

[2] The First Circuit held that this Court's precedent concerning location tracking is "criminal in nature" and thus inapposite. Pet. App. 28a; *Carpenter*, 585 U.S. at 296; *United States v. Jones*, 565 U.S. 400, 404 (2012). But "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara*, 387 U.S. at 530.

any single inspection ever could. *Id.* at 311; *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring).

The MDMR Rule enables "dragnet-type law enforcement practices." *Jones*, 565 U.S. at 409 n.6 (quoting *United States v. Knotts*, 460 U.S. 276, 284 (1983)). The GPS device does not turn off when Thompson uses his boat for personal reasons, such as when he transported his daughter-in-law to the mainland to give birth. Pet. Br. 7. It tracks Thompson's vessel 24 hours a day, 7 days a week, giving the government a vast repository of his movement history that it can "efficiently mine . . . for information years into the future." *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring).

The implications of this case do not stop at Maine's lobster boat docks. The decision below sanctions invasive, technology-enabled surveillance of other "closely regulated industries"—and the people who engage in them. Although this Court has been hesitant to expand the class of "closely regulated industries," *see Patel*, 576 U.S. at 424–25, lower courts have not. Today, "closely regulated" status applies to precious metals,[3] pharmacies,[4] sand and gravel,[5] nightclubs,[6] tobacco,[7] taxidermy,[8] medical drugs,[9] food safety,[10] veterinary

[3] *Liberty Coins, LLC v. Goodman*, 880 F.3d 274 (6th Cir. 2018).
[4] *United States v. Acklen*, 690 F.2d 70 (6th Cir. 1982).
[5] *Marshall v. Nolichuckey Sand Co.*, 606 F.2d 693 (6th Cir. 1979).
[6] *Club Retro LLC v. Hilton*, 568 F.3d 181 (5th Cir. 2009).
[7] *United States v. Hamad*, 809 F.3d 898 (7th Cir. 2016).
[8] *United Taxidermists Ass'n v. Ill. Dep't of Nat. Res.*, 436 F. App'x. 692 (7th Cir. 2011).
[9] *United States v. Gonsalves*, 435 F.3d 64 (1st Cir. 2006).
[10] *Contreras v. City of Chicago*, 119 F.3d 1286 (7th Cir. 1997).

drugs,[11] sale of rabbits,[12] fishing,[13] commercial trucking,[14] foreign trade zones,[15] oil and gas,[16] transporting hazardous materials,[17] adult entertainment,[18] daycare centers,[19] food trucks,[20] massage parlors,[21] dog breeding,[22] funeral homes,[23] gambling,[24] banks,[25] insurance companies,[26] and convenience stores.[27] Under the First Circuit's reasoning, every vehicle used in any of these industries could be subject to continuous surveillance.

The administrative search exception was not designed to permit the continuous, warrantless surveillance of any person working in any industry the government chooses to regulate. Over the last 56 years, this Court "has identified only four industries that" have earned the title of "closely regulated." *Patel*, 576 U.S. at 424. It has declined to overextend this

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[11] *United States v. Argent Chem. Lab'ys., Inc.*, 93 F.3d 572 (9th Cir. 1996).
[12] *Lesser v. Espy*, 34 F.3d 1301 (7th Cir. 1994).
[13] *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991).
[14] *United States v. Delgado*, 545 F.3d 1195 (9th Cir. 2008).
[15] *United States v. 4,432 Mastercases of Cigarettes*, 448 F.3d 1168 (9th Cir. 2006).
[16] *United States v. V-1 Oil Co.*, 63 F.3d 909 (9th Cir. 1995).
[17] *V-1 Oil Co. v. Means*, 94 F.3d 1420 (10th Cir. 1996).
[18] *Club Madonna Inc. v. City of Miami Beach*, 42 F.4th 1231 (11th Cir. 2022).
[19] *Rush v. Obledo*, 756 F.2d 713 (9th Cir. 1985).
[20] *LMP Servs. v. City of Chicago*, 160 N.E.3d 822 (Ill. 2019).
[21] *Gora v. City of Ferndale*, 576 N.W.2d 141 (Mich. 1998).
[22] *State v. Warren*, 439 P.3d 357 (Mont. 2019).
[23] *Heffner v. Murphy*, 745 F.3d 56 (3d Cir. 2014).
[24] *Rivera-Corraliza v. Puig-Morales*, 794 F.3d 208 (1st Cir. 2015).
[25] *United States v. Chuang*, 897 F.2d 646 (2d Cir. 1990).
[26] *De La Cruz v. Quackenbush*, 96 Cal. Rptr. 2d 92 (Cal. Ct. App. 2000).
[27] *Midwest Retailer Assoc., Ltd. v. City of Toledo*, 563 F. Supp. 2d 796 (N.D. Ohio 2008).

classification to ensure that this "narrow exception" does not "swallow the rule." *Id.* at 424–25. Yet the decision below adopts an expansive reading that would encompass a sweeping array of industries, effectively authorizing unchecked, large-scale surveillance of businesses and people. Such a result is incompatible with the Fourth Amendment. Americans do not sacrifice a huge portion of their basic privacy simply by occupying part of their time working in a lawful industry.

CONCLUSION

For these reasons and those described by Petitioner, this Court should grant the petition.

Respectfully submitted,

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